

**THE JOINT COMMITTEE ON TRUST LAW REFORM\***

**Response to the FSTB's Draft Consultation Conclusions in relation to  
the Trustee Ordinance Review**

This response has been prepared following our 6 January 2010 meeting with the FSTB during which we discussed their Consultation Conclusions document issued following the close of the consultation on the proposed Trust Law reform. We found the Consultation Conclusions document to be a very clear, excellent summary of the FSTB's position following the consultation and we were grateful to the FSTB for an opportunity to discuss it with them. The 6 January 2010 meeting was very helpful in allowing us to better understand the considerations that underpinned the conclusions stated in the FSTB's working draft.

It was agreed during the meeting that we would make further representations in relation to several areas where the FSTB might be minded to reconsider its position, given that the JCTLR consider these to be important for Hong Kong in attracting trust business being:

- The proposal that a statutory fixed perpetuity period of 150 years be introduced; and
- In relation to the introduction of non-charitable purpose trusts.
- Greater certainty on the statutory control of trustee exemption clauses.

Our further representations on these points are as follows:

**1. The proposal that a statutory fixed perpetuity period of 150 years be introduced**

In the initial consultation paper, the FSTB provided two options in relation to the rule against perpetuities ('RAP'): the abolition of the RAP or the introduction of a fixed, longer perpetuity period. As between these two options, the FSTB seemed open-minded. The working draft of the Consultation Conclusions document notes that '*a great majority*' of respondents supported the abolition of the RAP. Despite this, the proposal advanced now is to amend the Perpetuities and Accumulations Ordinance to introduce a fixed perpetuity period of 150 years. We were disappointed by this proposal and would strongly recommend that the FSTB consider abolishing the RAP.

It is widely considered that the RAP is archaic, overly complex and can act to frustrate the intentions of settlors. The fundamental concern in relation to the abolition of the RAP that exists in England because of its freehold land regime does not exist in Hong Kong, where almost all private land in Hong Kong is leasehold. Our view as trust lawyers and trust professionals is that the retention of any RAP will significantly limit the use of Hong Kong law as the governing law of trusts both by Hong Kong residents and by international settlors. Settlors have significant freedom to choose a governing trust law. While they may well find aspects of the revised Hong Kong trust law attractive, any RAP will be a significant disincentive to use a Hong Kong governing law because:

- A number of other leading international finance centres (e.g. Bermuda, Guernsey, Jersey and many US states including Delaware) have abolished the RAP. This trend is likely to continue such that any RAP will look even more anachronistic in coming years.
- With increased life expectancy, even a 150-year perpetuity period may not be attractive to a settlor with dynastic intent representing a period of merely two generations. Further, it is not correct to consider that beneficiaries are disadvantaged where trusts can exist perpetually because the trustees of

perpetual trusts will still be required to properly consider the exercise of their dispositive powers and will have the same fiduciary duties in relation to the beneficiaries as do trustees of limited duration trusts.

- From a draftsman's perspective, a choice of a governing law with a RAP might lead to criticism in the future given that its effect is to bind the entirety of the trust property to that vesting date.

If a perpetual trust can be created in another leading international finance centre, there is little incentive for a settlor to choose a Hong Kong governing law which will subject the trust fund to the RAP. Accordingly, the inclusion of any RAP will steer prospective settlors away from using Hong Kong law as the proper law of trusts they create, and will steer financial institutions away from setting up trust operations in Hong Kong when they can operate in jurisdictions with no RAP.

## **2. The introduction of non-charitable purpose trusts**

The working draft of the Consultation Conclusions document provides the FSTB's initial response on non-charitable purpose trusts on page 25. For the reasons there stated, it is proposed by the FSTB that a study on non-charitable purpose trusts should be carried out by the Law Reform Commission. We respectfully request that the FSTB reconsider their response to permit the introduction of non-charitable purpose trust law into the amending legislation proposed.

When the question of the inclusion of non-charitable purpose trusts was debated at the open forum conducted by the JCTLR regarding the Consultation, a substantial majority of those present were in favour of the introduction of non-charitable purpose trusts. We suggest that the JCTLR's participants, and the STEP and HKTA members they represent, comprise more than any other bodies, the working face of the Trust Industry in Hong Kong.

Where it is appropriate and benefits Hong Kong, it is appropriate to look at the needs of those who would legitimately use Hong Kong as a jurisdiction for

trust business. We have identified genuine commercial uses for such trusts which would enhance the commercial trusts business of Hong Kong and bring to the jurisdiction valuable and entirely legal and proper business which presently has to go elsewhere.

FSTB has correctly stated that misuse of non-charitable purpose trust law is countered by appropriate anti-money laundering regulations and would also be covered by the provisions of the Organised and Serious Crimes Ordinance.

The ingredients of good non-charitable purpose trust law can be stated to be as follows:-

- The requirement that one or more of the trustees must be within the jurisdiction of the governing law.
- The requirement for an Enforcer or other supernumerary whose duty is to enforce the trust.
- The requirement for the trustee to appoint an Enforcer if there is none.
- Provision to the effect that immoral or illegal purposes will be invalid.
- Provision when the initial purpose terminates to hold the Trust Fund for other purposes or to distribute it to persons.

The question of who enforces the Enforcer has not deterred any other jurisdiction which has introduced such legislation. The Enforcer could simply be enforced by the court upon an application made by any interested party, which could include any person benefiting from the purpose and any regulator of the trustee. The fact that there is limited case law on the use and enforcement of non-charitable purpose trusts may indicate that, in practice, their enforcement has not been an issue.

Other jurisdictions have successfully introduced such legislation into an amending statute without the need for new legislation; for example the BVI and Guernsey.

### 3. **Proposals regarding Trustees Exemption Clauses**

With reference to paragraphs 58 – 64 of the proposals we would urge the adoption of our proposals in para 3.6 of the JCTLR response to the Consultation Paper. We suggest provisions be enacted to ensure that Professional Trustees who receive remuneration for their services should not have the benefit of exemption clauses except:

- (a) where the Settlor has been fully and properly and independently advised upon the nature and extent of exculpation; or
- (b) where all the beneficiaries who are sui juris consent to a specific breach of trust

provided however that under no circumstances should exculpation for fraud, willful default and gross negligence be permitted.

We think this adds considerable more certainty than a reasonableness test as suggested in the Response Document. We also urge the retention of the existing provision allowing the court to relieve any trustee (professional or lay) from personal liability for a breach of trust.

Presently, the excellent proposals for change, which we have welcomed, do little more than Singapore has already done to change existing legislation. It would be wholly to the advantage of Hong Kong to introduce at least one unharmed and beneficial item of substance which will mark the amending legislation of Hong Kong as a step ahead of Singapore and which will attract genuine business to the jurisdiction. The JCTL respectfully requests that the FSTB reconsider their response to permit the introduction of non-charitable Purpose Trust law into the amending legislation proposed. The JCTLR would be delighted to work with the FSTB to assist in the drafting of the relevant legislation and to ensure that this step would not hold up the introduction of the amendments generally.

Finally, we discussed during the meeting the decision to retain the list of Authorised Investments under the Second Schedule of the Trustee Ordinance. We explained that we would like the opportunity to review and update the contents of the Second Schedule at the same time that the Trustee Ordinance is being reviewed. We take note of your comments that perhaps a more principles based approach would be appropriate. The JCTLR will establish a sub-committee to address the issue and second members of the HK Investment Funds Association to assist. We would undertake to provide an initial recommendations paper to the FSTB by 30 April 2010.

Thank you for this opportunity of commenting on the Draft Proposals. Please feel free to contact us should you require any elaboration on these comments or with respect to the reform process generally.

Yours sincerely



**Bill Ahern**

Co-Chair

STEP

Tel: 2422 7882

Email: [william@familycapital.hk](mailto:william@familycapital.hk)



**Carolyn Butler**

Co-Chair

HKTA

Tel: 25177848

Email: [carolyn@henlyngroup.com](mailto:carolyn@henlyngroup.com)

Hong Kong

13<sup>th</sup> January 2010